85-1168

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NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

CITY OF CLEVELAND, et al.,

Petitioners,

vs.

JANE HAWLEY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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GEORGE DOUGHTY

QUESTIONS PRESENTED FOR REVIEW

1. Are plaintiffs, who challenge the constitutionality of a chapel at a municipal airport, threatened with non-economic injury sufficient to establish standing where the sole, non-economic injury asserted by plaintiffs is that their beneficial use of said airport will be impaired by knowledge of the mere presence of a chapel at the airport, absent any indication in the record that the chapel would otherwise impair plaintiffs' secular use of the airport?

2. Do plaintiffs have personalized economic injury sufficient to establish the required standing to challenge, on first amendment grounds, a lease authorizing the rental of space for a chapel located at a municipal airport, where operation of said airport is not subsidized at all by plaintiffs' public tax dollars?

PARTIES BELOW

In the United States District Court for the Northern District of Ohio the original plaintiffs were Jane Hawley, Lucille Branch, David Finley, and "Americans United for Separation of Church and State". Plaintiffs subsequently amended their Complaint to delete "Americans United for Separation of Church and State" and to add, as additional plaintiffs, Eileen Roberts and William James. Named as defendants in the District Court were the City of Cleveland, then Cleveland Port Control Director George Doughty, the Catholic Diocese of Cleveland, and the Most Reverend Anthony M. Pilla, Bishop of the Cleveland Diocese.

On appeal before the Sixth Circuit, Jane Hawley, Lucille Branch, David Finley, Eileen Roberts, and William James were appellants. The original named defendants in the District Court were all appellees before the Sixth Circuit Court of Appeals.

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OPINIONS BELOW

The District Court's Memorandum and Order, granting defendants' motions for summary judgment and dismissing the action for want of standing was filed on May 15, 1984 and entered on May 17, 1984. A copy of said Memorandum and Order is appended hereto at page A-28.

The decision of the United States Court of Appeals for the Sixth Circuit, Hawley v. City of Cleveland, reversing and remanding the lower court's decision was filed and is dated October 3, 1985. This opinion, which is published at 773 F. 2d 736 (6th Cir. 1985), is appended hereto at page A-1.

JURISDICTIONAL STATEMENT

Review of the decision of the U.S. Court of Appeals for the Sixth Circuit, dated October 3, 1985, (appended hereto at page A-1) is sought by petitioners pursuant to 28 U.S.C. § 1254(1). It is contended and will be argued herein that the decision appealed from conflicts materially both with this Court's opinion in Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) and with the position adopted by the Second Circuit Court of Appeals in Brashich v. Port Authority of New York, 484 F. Supp. 697 (S.D. N..Y. 1979) aff'd, 628 F. 2d 1344 (1980). Thus, petitoners respectfully submit that review is appropriate pursuant to the criteria set forth in Rule 17(1)(a) and (c) of the Supreme Court Rules.

CONSTITUTIONAL

PROVISIONS INVOLVED

This action involves the interpretation of the Establishment Clause of First Amendment to the United States Constitution, as made applicable to the States pursuant to the Fourteenth Amendment, and Article III of the Constitution of the United States. These constitutional provisions are cited in the Appendix attached hereto.

STATEMENT OF THE CASE

On August 8, 1983, plaintiffs--three resident taxpayers of the City of Cleveland and Americans United for Separation of Church and State--initiated this action against the City of Cleveland, the then City Director of Port Control, the Catholic Diocese of Cleveland and Bishop Anthony M. Pilla. Plaintiffs sought an injunction restraining the City from entering into an Agreement with Bishop Pilla of the Cleveland Diocese for use of certain space at Cleveland Hopkins Airport for a chapel to be available to members of all faiths. Plaintiffs further sought a declaration that the ordinance and lease executed thereunder were unconstitutional. At the same time plaintiffs moved for a preliminary injunction.

While the motion for preliminary injunction was pending, both the municipal and diocesan defendants moved for summary judgment on the grounds that (1) plaintiffs lacked standing, and (2) defendants were entitled to judgment on the merits.

On December 21, 1983, the district court granted plaintiffs leave to file an amended complaint. The amended complaint alleged that the chapel would interfere with plaintiffs' secular use of Hopkins Airport.

On May 15, 1984, the district court issued a Memorandum and Order finding that the plaintiffs lacked standing and dismissing the action. Judgment of dismissal was entered on May 17, 1984, and plaintiffs appealed.

On October 3, 1985 the Sixth Circuit, in an opinion authored by Judge Peck, held that the plaintiffs had established non-economic standing as a matter of law. Hawley v. City of Cleveland, 773 F. 2d 736 (6th Cir. 1985). The Court further held that a genuine issue of material fact existed, as to whether plaintiffs had economic standing. The case was reversed and remanded.

The Sixth Circuit recognized that "...operation of [Hopkins] airport is not subsidized by Cleveland taxes." 773 F. 2d at 738. Stated the Court:

> Airport expenses are paid by user fees levied on the airlines which use the facility, with fees assessed in such a manner that receipts balance expenditures. If any one airline becomes unable to pay its fees, the remaining airlines' fees are increased; only in the highly unlikely

> event of a simultaneous default by all airlines could the City be required to devote tax revenues to airport expenses. Id at 737.

Additional facts concerning the Chapel are undisputed in the record. The only evidence of a chapel which need confront airport visitors or patrons are signs simply indicating the word "chapel". Pursuant to the Lease, the exterior of the chapel must be identical in design to the exterior of airport gift shops, car rental agencies, newstands, restaurants, etc.

As stated by the Sixth Circuit:

> . . . the chapel's exterior will conform with the airport design and will only be identified with a simple sign saying "chapel". Id. at 737.

REASONS IN SUPPORT OF PETITION

A. INTRODUCTION

In order to present a justiciable question to a court, a party must show he "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). (Emphasis supplied.) As this Court has stated:

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.
>
> Ex parte Levitt, 302 U.S. 633, 634 (1937); Troutman v Shriver, 417 F. 2d 171, 174 (5th Cir. 1969). (Emphasis supplied.)

Thus, "sheer motivation and commitment to the subject matter of a suit, no matter how strong, cannot substitute for judicially cognizable injury." See, Schlesinger v. Reservists' Committee to Stop the War, 418 U.S. 208, 226 (1974); Sierra Club v. Morton, 405 U.S. 727, 739 (1972); American Jewish Congress v. Vance, 575 F. 2d 939, 943 (D.C. Cir. 1978).

Under the complaint and amended complaints filed in this action, and pursuant to the undisputed facts of this matter the Sixth Circuit's decision, finding standing as a matter of law, materially conflicts with this Court's decision in Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464 (1982). In Valley Forge the Supreme Court held that, absent an allegation of specific, individualized injury, either pursuant to

the misuse of tax dollars or a non-economic injury in fact, a litigant cannot establish standing to contest a government action allegedly in violation of the Establishment Clause.

B. NON-ECONOMIC INJURY

The plaintiffs herein have suffered no non-economic injury sufficient to confer standing; the Supreme Court decision in Valley Forge confirms this fact. In response to defendants' motion for summary judgment, plaintiffs could point to no facts supporting their claim that their secular use of the airport would be impaired.

The affidavit of plaintiff-Roberts, attached to plaintiff's brief in opposition to defendants' motion for summary judgment, is the sole factual basis for plaintiffs' claim of standing premised upon non-economic injury. Ms. Roberts claims in her affidavit that

she frequently uses the Airport, including the area of the Airport where the chapel entrance will be located. According to this plaintiff, the presence of a chapel on City property will affront and embarrass her.

Plaintiffs in Valley Forge claimed standing by virtue of their shared right to a "government [which] makes no law respecting the establishment of religion." According to the Court, plaintiffs failed "to identify any personal injury suffered . . . as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing. . ." 454 U.S. at 485. Held the Court:

> [The] requirements of standing are not satisfied by the abstract injury in non-observance of the Constitution asserted by citizens. . . assertion of a right to a particular kind of Government conduct which the Government has violated by acting differently, cannot alone satisfy the requirements of Article III, without draining those requirements of meaning. 454 U.S. at 482, 483. (Emphasis supplied).

Petitioners submit that if the Roberts affidavit and the bare allegations of the complaint are found sufficient to confer standing, then the Supreme Court's decision in Valley Forge will be drained of all meaning. As a matter of law, plaintiff's injuries, which they claim will result from the chapel, are nothing more the "generalized injury" found inadequate to confer standing in Valley Forge.

The uncontroverted evidence before this Court falls drastically short of the personalized, non-economic injury required to establish First Amendment standing. The chapel agreement explicitly prohibits the Bishop from constructing any exterior edifice that differs from the architectural plan for the Airport. Ms. Roberts clearly objects to the religious activities (be they Catholic, Protestant, Jewish, etc.) being undertaken inside the Chapel. However, activities undertaken inside the chapel simply do not impair her secular use of the airport.

The cases cited by the Sixth Circuit to support a finding of non-economic standing are not controlling under the instant facts. The instant situation is entirely distinguishable from ACLU v. Rabun County, 678 F. 2d 1379 (11th Cir. 1979) aff'd on rehearing 698 F. 2d

1089 (11th Cir 1983) labeled by the Appellate Court as "persuasive authority". In Rabun, a local government placed, in a state park, an illuminated cross 26 feet by 35 feet containing thirty-one 175 watt mercury vapor lights, 678 F. 2d at 1382 n.1. The cross, when illuminated, not only flooded two camping areas with light, but was visible for several miles, 678 F. 2d at 1381-82. Plaintiffs were campers who would no longer use this park due to this intensely lit cross "bright enough to enable one to read at night," 678 F. 2d at 1384. Even under these facts, the Eleventh Circuit, in Rabun, took pains to distinguish their case from the generalized injury found inadequate to confer standing in Valley Forge. Rabun is clearly inapposite.

Plaintiffs in our instant action, unlike plaintiffs in Rabun, have pleaded no facts and established no basis to conclude that any of them have or will suffer any individualized injury sufficient to confer standing. Merely having to look at a sign that says "chapel" does not rise to the level of individual injury necessary under Article III of our Constitution.

While bypassing the seminal opinion in Valley Forge, supra, the Sixth Circuit relied, instead, on this Courts' decision in United States v. S.C.R.A.P., 412 U.S. 669 (1973). This case does not support the decision below.

In SCRAP, this Court held that the allegations of the complaint were sufficient to withstand a motion to dismiss. SCRAP involved a challenge to certain

Interstate Commerce Commission orders, including approval of a rate structure which would discourage use of recyclable materials. Plaintiffs in SCRAP alleged:

> ... that their members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities.
> 412 U.S. at 685.

These allegations of impairment of the beneficial use of public lands were sufficient to overcome a motion to dismiss. However, this Court made clear that more than mere allegation may be necessary to overcome a motion for summary judgment:

> Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A

> plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial. But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affect. If, as the railroads now assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact.

Id. at 668-69 (emphasis supplied)

In the instant case, the City (and the Diocese) did file for summary judgment based upon a record which established that

plaintiffs' secular use of the airport simply will not be impaired by the chapel. Unlike the giant illuminated cross in Rabun and the littered parks and streams in SCRAP, the instant plaintiffs' beneficial use of Hopkins Airport is not limited or affected in the least. The opinion below, finding non-economic standing as a matter of law, ignores this Court's clear holding in Valley Forge. The instant plaintiffs have suffered no deprivation other than "observation of conduct with which one disagrees." Valley Forge, 454 U.S. at 485.

C. ECONOMIC INJURY

The Sixth Circuit further erred in holding that a material issue of fact existed concerning whether plaintiffs can assert standing as municipal taxpayers.

In Valley Forge, supra, this Court dismissed an action challenging the conveyance by the Secretary of Health, Education and Welfare of "surplus property" which had formerly been used as a hospital. The realty was discounted by 100% by the government and transferred by the secretary, to a bible college, for no consideration. The Court held that plaintiffs, Americans United for Separation of Church and State, had no standing either as taxpayers or generally as citizens.

This Court in Valley Forge noted that any connection between the challenged property transfer and plaintiff's tax burden was "at best speculative and at worst nonexistent." 454 U.S. at 480, n. 17. Stated the Court:

> [Plaintiffs'] only objection is that the Government did not

> receive adequate consideration for the transfer, because [defendants'] use of the property will not confer a public benefit. . . Assuming, arguendo, that this proposition is true, an assumption by no means clear, there is no basis for believing that a transfer to a different purchaser would have added to the Government receipts. Id.

Thus, the Court concluded that the plaintiffs were without standing to sue as taxpayers.

Under the instant facts, the within plaintiffs are clearly without taxpayer standing as there is absolutely no connection between plaintiffs' tax dollars and the agreement between the City of Cleveland and the Bishop. Indeed, performance under this agreement simply does not implicate plaintiff's tax burden.

First, the proposed chapel site has never been rented, nor has any business

shown any interest in this space. The Diocese, under the Agreement, will make permanent improvements and pay all utilities, in addition to an annual fee. At the expiration of the term of the Agreement, title to permanent improvements vests in the City. It can hardly be said that transforming this unused property into a chapel (available to all faiths) harms plaintiffs' pocketbooks, particularly given the fact that the airport now will derive rent from a space which provided no income in the past.

More important, as discussed, Hopkins International Airport is an economic self-sustaining entity, relying upon bond proceeds, airline user, and landing fees, concession agreements and other income-producing activity for its

operation. It receives no municipal tax aid, nor does it receive state tax dollars. The airlines, and not the City of Cleveland, secure the airport bonds and are charged yearly if airport expenses exceed revenue. The nexus between plaintiffs' tax dollars and the proposed chapel under the instant facts is far more tenuous than that found inadequate to confer standing by the Supreme Court in Valley Forge, supra.

Further support for petitioners' position is found in Brashich v. Port Authority, 484 F. Supp. 697 (S.D.N.Y. 1979), aff'd. 628 F. 2d 1344 (2nd Cir. 1980). In Brashich, plaintiff brought suit alleging that the leasing of land to three religious groups for the erection of

three free standing chapels at John F. Kennedy Airport ("JFK") violated the establishment clause of the First Amendment of the United States Constitution. Finding that plaintiff lacked standing, the district court dismissed the action (and the Second Circuit affirmed the dismissal).

The district court in Brashich first determined that plaintiff lacked any standing as a taxpayer. According to the court, plaintiff failed to allege or prove "the required nexus between himself as a taxpayer and expenditures by the Port Authority in violation of the Establishment Clause." 484 F. Supp. at 701. The court's characterization of the Port Authority, in Brashich, is nearly

identical to that of the Cleveland Department of Port Control. Stated the court:

> The Port Authority . . . raises its own revenue and relies upon its own resources without dependence upon State tax revenues. It lacks the power to levy taxes and, without legislative approval, lacks the power to pledge the credit of New York or New Jersey. The Port Authority finances its projects primarily through sale of bonds to the public. 484 F. Supp. 699.[1]

The Sixth Circuit acknowledged that the airport is entirely self sustaining and that the challenged transaction does not involve an expenditure of plaintiffs'

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1 The court also found that plaintiff, in Brashich had no non-economic standing as he failed to allege any injury to his secular use of J.F.K. airport.

tax dollars. The economic standing argument is premised instead upon an incentive compensation plan whereby one year's non-airline revenue, as compared to the prior year's revenue, can result in an incentive payment to the City's general fund. In addition to non-airline revenues, other variables in this formula include number of enplaned passengers and consumer price index.

Petitioners submit that a possible re-imbursement to the general fund of the City of Cleveland is simply too speculative a basis upon which to establish tax payer standing given the total absence of any other nexus between plaintiffs' tax dollars and the operation of Cleveland Hopkins International Airport. In sum, as a matter of law plaintiffs will suffer absolutely no

pocketbook injury as a result of the challenged rental arrangement. The asserted injury is "at best speculative and at worst non-existent."

IV. CONCLUSION

For all of the foregoing reasons, petitioners City of Cleveland and George Doughty respectfully request that this honorable Court grant a writ of certiorari as sought herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing Petition for Writ of Certiorari of City of Cleveland and George Doughty have been served upon the following parties and/or counsel of record, by U.S. mail, postage prepaid, this 9th day of January, 1986:

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A P P E N D I X

NO. 84-3458

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

JANE HAWLEY; LUCILLE BRANCH; DAVID FINLEY; EILEEN ROBERTS; and WILLIAM JAMES,	)	
Plaintiffs-Appellants,	)	APPEAL from the United States District Court for the Northern District of Ohio
v.	)	
CITY OF CLEVELAND; GEORGE F. DOUGHTY, Director of Port Control; CATHOLIC DIOCESE OF CLEVELAND; BISHOP ANTHONY M. PILLA,	)	
Defendants-Appellees.	)	

Decided and Filed October 3, 1985

Before: MARTIN and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This is a first amendment case, involving the application of the first amendment's Establishment Clause (as made applicable to the states through the fourteenth amendment) to the leasing of space in an airport to a church for use as a chapel. Appellants, taxpayers in the City of Cleveland, filed suit in the district court seeking to enjoin such a lease by the City's Department of Port Control ("Port Control") to the Cathholic Diocese of Cleveland ("the diocese"). The district court held that taxpayers lacked standing and dismissed the suit. We reverse.

I.

A.

Cleveland Hopkins International Airport is operated by the City of

Cleveland through the City's Department of Port Control. The effect of the airport's finances on the City's fisc is, however, limited. Airport expenses are paid by user fees levied on the airlines which use the facility, with fees assessed in such a manner that receipts balance expenditures. If any one airline becomes unable to pay its fees, the remaining airlines' fees are increased; only in the highly unlikely event of a simultaneous default by all airlines could the City be required to devote tax revenues to airport expenses. There is, however, one manner in which airport revenues can affect municipal finances. The airlines have agreed, in order to give Port Control a motive to operate the airport efficiently, to give the City's general fund a share of non-flight related revenues, such as shop

rentals. The amount of these "incentive payments" can be substantial; in 1981, incentive payments to the City totaled $2,272,293. Obviously, improvident operation could result in a reduction of such payments.

In 1983, the City reached an agreement with the diocese and its bishop, the Most Reverend Anthony M. Pilla, to rent 2,733 square feet of space inside the airport terminal building for use as a chapel. The agreement was approved in a June 20, 1983 ordinance passed by Cleveland's City Council. The twenty year lease provides that the chapel will be open to persons of all faiths and be available for non-Catholic religious services, subject to scheduling by the Catholic bishop. Just how obvious the chapel's association with the Catholic

Church will appear upon visual examination may be open to question. On the one hand, the chapel's exterior will conform with the airport design, and will only be identified by a simple sign saying "chapel;" signs elsewhere in the airport will indicate the location of the chapel. The chapel will have some stained glass windows in or around the exterior doors. The interior will be designed so that specifically Catholic religious symbols can be removed when the chapel is to be used by members of another faith. On the other hand, it appears that the chapel will contain at least some permanent furnishings which, if not exclusively Catholic, bespeak at least a Christian orientation and are common to Catholic places of worship (e.g., an altar, a holy water font, a statute(sic) of the Madonna).

There is some controversy as to the effect of the chapel rental on the amount of incentive payments to the City. The lease requires the diocese to pay the City rent of $1,200 a year - about 44¢ per square foot of rented space. Since the average rental rate for space in the airport terminal is approximately $20 per square foot, the chapel rental rate constitutes an apparent subsidy by the City to the diocese. There are other facts, however, which make it unclear whether this is the case. The space which the diocese is renting is located on the least used airport concourse, and is not prime rental space. The space had previously been used for storage and as a first-aid station, and no business had expressed interest in renting it. The diocese had previously offered a larger

sum of money to rent space elsewhere in the airport and had been rejected, presumably because of the likelihood that Port Control would have been able to obtain still higher rents from businesses interested in that particular space. The City and the diocese contend that there was no real commercial possibility of renting the area here in question to anyone other than the diocese, and that by obtaining at least some rent for space which otherwise would have remained unrented, the City was actually improving its incentive payment status. Appellants reply that twenty years is a long time, that there is very little unrented space remaining inside the airport, and that it is very likely that the rental to the diocese will at some point have the effect of excluding tenants who would pay a

higher rental. They contend as well that there may have been other parties interested in the space, noting that businesses have approached Port Control with requests to rent airport space only to be turned down. The City responds that no one else had indicated any interest in this particular space, but concedes that it made no active attempt to seek other tenants. Port Control did not solicit bids on the space.

To sum up, the operation of the airport is not subsidized by Cleveland taxes. Receipts from airport shop rentals, however, may result in increased revenues for the City. It cannot be determined on the basis of the present record whether the rental by the City to the diocese will enhance or decrease such revenues.

B.

Appellants are Cleveland taxpayers[1] who filed suit in the United States District Court for the Northern District of Ohio, seeking to enjoin the City and the diocese from carrying out the terms of their lease on the ground that it represents a subsidy by the City to the diocese in violation of the Establishment Clause in the first amendment, as made applicable to the states through the fourteenth amendment. The City and the diocese moved for dismissal, arguing that appellants lacked standing to bring the

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[1] Americans United for Separation of Church and State, a national organization dedicated to defending what it regards as first amendment principles of religious liberty, originally was a party to the suit. It withdrew, however, before trial.

suit. The court granted the motion, ruling that Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) and Doremus v. Board of Education, 342 U.S. 429 (1952) compelled the conclusion that appellants did lack standing. Appellants then appealed to this court. Appellants raise various arguments as to why they have standing to bring the present suit.

II.

A.

The Temporary Emergency Court of Appeals recently succinctly summarized the nature of standing as follows:

> To establish standing, appellants must demonstrate that they have "'such a personal stake in the outcome of the controversy' as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their]

behalf." Warth v. Seldin, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975). In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976), the Supreme Court stated that "the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."

Midwest Petroleum Co. v. United States Dept. of Energy, 760 F.2d 287, 289 (Temp. Emer. Ct. App. 1985). We first consider whether plaintiffs have asserted a sufficient personal stake in the controversy over the building of the airport chapel to warrant their invocation of the jurisdiction of the federal courts.

B.

Appellants assert that they have suffered non-economic injury as a result of the lease of space for the chapel. They allege that they "regularly use

Cleveland Hopkins International Airport" and that the "presence of a sectarian chapel at Cleveland Hopkins Airport impairs [their] use and enjoyment of the public facility." Amended Complaint at ¶3(c).

In Valley Forge, plaintiffs, an organization dedicated to the separation of church and state, and several of its employees, challenged the conveyance of property by the federal government to a church-related college without any cost to the college. The Court held that plaintiffs lacked standing, either in their capacity as taxpayers or as citizens,to challenge the conveyance. The Court rejected plaintiffs' claim to general "citizen standing," which the lower court had accepted because the "challenged governmental action caused

'injury in fact' to their shared individuated right" to prevent government from violating the Establishment Clause. 454 U.S. at 476-82; 619 F.2d 252, 261 (3d Cir. 1950). In discussing plaintiffs' lack of standing on the basis of non-economic injury, the Court stated that plaintiffs

> fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III. . . .

Id. at 485. (Emphasis in original.) The Court further stated:

> In reaching this conclusion, we do not retreat from our earlier holdings that standing may be predicated on noneconomic injury. See, e.g., United States v. SCRAP,

> 412 U.S., at 686-688; Association of Data Processing Service Orgs. v. Camp, 397 U.S., at 153-154. We simply cannot see that respondents have alleged an injury of any kind, economic or otherwise, sufficient to confer standing.

Id. at 486. (Emphasis in original.) The Court noted that none of the plaintiffs resided within the state where the property was located, all of the plaintiffs learned of the proposed transfer through news releases, and none of the plaintiffs expressed any interest in using the property and thus could not claim their beneficial use of the property had been impaired.

A comparison of two landmark Supreme Court cases, Sierra Club v. Morton, 405 U.S. 727 (1972), and United States v. SCRAP, 412 U.S. 669 (1973), indicates why the non-economic injury analysis of Valley Forge is not a bar to

standing here. In Sierra Club the Court rejected plaintiff's theory of standing premised upon its status as a "representative of the public." 405 U.S. at 735-36 n.8. The Court, however, indicated that allegations concerning individual members' use of the park being affected by the challenged action would be sufficienit to confer standing.[2] Id. In SCRAP Washington, D.C. area plaintiffs challenged a proposed railroad freight hike alleging that theincrease would discourage recycling of disposable cans and bottles and therefore damage Washington area national parks which they used. The Court found plaintiffs to have standing.

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[2]The Sierra Club plaintiff adopted the Court's suggestion, amended its complaint to state individualized injury, and was found to have standing. See Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972).

In ACLU v. Rabun County, 698 F.2d 1098 (11th Cir. 1983), modifying 678 F.2d 1379 (11th Cir. 1982), plaintiffs, the ACLU and five individuals, brought suit alleging that the maintenance of a large, illuminated latin cross in a Georgia state park violated the Establishment Clause. The individual plaintiffs were residents of Georgia. Only one had actually seen the cross; the others learned of the cross from anonymous phone calls and news releases. Two of the plaintiffs testified that they camped regularly, although not in the park where the cross was located. Each of the individual plaintiffs testified that they would not use the state park as long as the cross remained there, because of both its physical and metaphysical impact. The court held that although the plaintiffs' underlying

motivations could "be described as either a spiritual belief or a commitment to separation of church and state," they had "demonstrated an individualized injury, other than a mere psychological reaction, which they have suffered 'as a consdequence' of the challenged action." Id. at 1108. With regard to the two plaintiffs who testified that they were campers, the court found that they had

> sufficiently demonstrated particularized and personalized noneconomic injury to distinguish them from the general citizenry who may be as equally offended on a philosophical basis but who are not asspecifically or perceptibly harmed, consistent with both the prior precedent defining noneconomic injuries in general and the decision in Valley Forge, to provide them with a "personal stake in the controvoersy." Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

Id. at 1108. Thus, we view Rabun County

as persuasive authority for the proposition that a plaintiff challenging sectarian use of public property for impairing his actual use and enjoyment of that property has standing to challenge the impermissible activity.

In the instant case, as in SCRAP and Rabun, plaintiffs claim impairment of their beneficial use of a public facility which they frequently use. Unlike the plaintiffs in Valley Forge, who did not reside in the state in which the transferred property was located, plaintiffs here are residents of Cleveland or Cuyahoga County and are taxpayers in the City of Cleveland; they regularly use Cleveland Hopkins International Airport. Even if they can avoid the chapel area by utilizing different concourses or stairways, this impingement on their right to use the airport is sufficient to confer standing since it would "force them to assume special burdens" to avoid

"unwelcome religious exercises." Valley Forge, 454 U.S. at 487 n.22. See also Allen v. Hickel,[3] 424 F.2d 944 (D.C. Cir. 1970); Birdine v. Moveland, 570 F. Supp. 412 (N.D. Ga. 1983).

C.

Appellants also claim, on two grounds, that the renting of the space for the chapel to the diocese causes them economic harm. Their first argument is that, were all of the airlines to default on their user fee obligations, they as

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[3]In Hickel plaintiffs challenged the placement of a nativity scene in the Ellipse, the park located across from the White House. The Government suggested that if plaintiffs did not want to look at the creche they could walk elsewhere. The court held "[p]laintiffs were entitled, as members of the public, to enjoy the park land and its devotion to permissible public use; a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional." 424 F.2d at 947, approvingly cited in Rabun, 698 F.2d at 1105.

Cleveland taxpayers would become responsible for the airport's finances. To say that imagining such a circumstance stretches credulity would be an understatement. The federal courts do not sit to resolve speculative controversies. Appellants also advance a second economic basis for standing which requires closer analysis. They assert that the City's rental of space of the diocese for what they contend is substantially less than market value will result in loss of revenue to the City's general fund through a reduction in the size of incentive payments. If true, this allegation could give appellants standing as municipal taxpayers to defend the public treasury. As we noted above, the record does not contain sufficient facts to enable us to determine whether the rental harms the

public purse, or whether it actually helps it by resulting in the rental of property which otherwise could not be rented at all. Because this is a question of fact, it must be resolved in the first instance by the trial court.

Appellees nevertheless argue that, under Valley Forge, appellants' status as taxpayers is insufficient to give them standing to object to the transaction. This, indeed, was the position taken by the district court. We conclude that the district court's ruling on this issue was erroneous, because that court failed to consider fully the impact of other taxpayer standing cases.

The seminal case on taxpayer standing is Frothingham v. Mellon, 262 U.S. 447 (1923), in which the Supreme Court held that federal taxpayers normally lack standing to sue to enjoin federal expenditures which they regard as

unconstitutional. The Supreme Court created a limited exception to this rule in Flast v. Cohen, 392 U.S. 83 (1968), ruling that taxpayers can sue to enjoin congressional appropriations made pursuant to the appropriation power given Congress by article I, section 8, of the Constitution, where such appropriations violate a specific constitutional provision, such as the Establishment Clause. In Valley Forge, the Supreme Court made clear that the Flast exception is a narrow one. Plaintiffs in Valley Forge sought to enjoin, not an appropriation made by Congress pursuant to article I, section 8, but a property transfer made by the Executive Department pursuant to article IV, secion 3, of the Cosntitution. In rejecting taxpayers, claim of standing in Valley Forge, the Supreme Court ruled that taxpayers may

claim standing under Flast only where an appropriation, as opposed to a property transfer or some other governmental act, is at issue.

The Frothingham Court,however, noted a distinction beween the requirements of taxpayer standing in suits by federal taxpayers and suits by municipal taxpayers. For present purposes, it is a crucial one. The Frothingham Court indicated an intent to leave undisturbed "the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation." 262 U.S. at486. The Court observed:

> The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not

> inappropriate. It is upheld by a large number of state cases and is the rule of this Court. Crampton v. Zabriskie, 101 U.S. 601, 609. Nevertheless, there are decisions to the contrary. See, for example, Miller v. Grandy, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance ot that subsisting between stockholder and private corporation.

Id. at 486-87. The Supreme Court has adhered to this rule in more recent opinions. See Doremus v. Board of Education, 342 U.S. 429, 433-34 (1952). In Lynch v. Donnelly, 104 S. Ct. 1355 (1984), the Supreme Court, without discussing standing, decided on the merits a suit by Pawtucket, Rhode Island taxpayers to enjoin municipal expenditures in connection with a Christmas creche. See also Gwinn Area Community Schools v. Michigan, 741 F.2d 840, 844 (6th Cir.

1984) ("'municipal taxpayer standing' is different from 'federal taxpayer standing.'"); Annunziato v. New Haven Board of Aldermen, 555 F. Supp. 427, 430-31 (D. Conn. 1982) (Valley Forge does not restrict municipal taxpayer standing). Finally, we note that the Supreme Court recently affirmed the holding of this court in Americans United for Separation of Church and State v. School District of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983), that state taxpayers have standing to challenge public aid to religious schools. Grand Rapids School District v. Ball, 53 U.S.L.W. 5006, 5007 n.5 (U.S. July 1, 1985). While the case is not precisely on point, it is added support for our view that the Supreme Court continues to allow suits by nonfederal taxpayers to enjoin

unconstitutional acts affecting public finances.

It thus appears that a question of material fact exists as to whether the rental of the space for the chapel to the diocese at the agreed-upon price could harm Cleveland's fisc. In addition, as we noted supra, appellants have alleged a non-economic basis for standing. Taking appellants'(sic) as true, as we must at this stage of the proceeding, dismissal for lack of standing is improper.[4]

III.

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[4]Because we find that appellants have standing, it is not necessary for us to consider their argument that the Cleveland City Charter's authorization of taxpayer suits to enjoin illegal contracts offers an independent basis for standing. We note, in addition, that this argument adds little to the claim of standing on the basis of harm to public finances, since if the contract is illegal, it is because it in some way represents a subsidy by the City to the diocese.

The judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.[5]

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[5]All parties devoted considerable time on appeal to arguing as to the relative extent to which the chapel is intended for Catholic as opposed to interdenominational use. In order to save time on remand, we should observe that this question is totally irrelevant to whether the lease violates the Establishment Clause. The Establishment Clause bars aid to all religions as surely as it bars preference to any particular religion. Grand Rapids School District v. Ball, 53 U.S.L.W. 5006, 5008 (U.S. July 1, 1985).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

JANE HAWLEY, et al. Plaintiffs	)	C83-3402
vs.	)	
CITY OF CLEVELAND et al.	)	MEMORANDUM AND ORDER
Defendants	)	

Plaintiffs have filed suit requesting the Court to enjoin the City of Cleveland from granting the Cleveland Diocese 2,733 square feet of city property for a period of 20 years for use as a Roman Catholic chapel, and to declare unconstitutional the ordinance and lease executed thereto authorizing this allocation of public property for a place of sectarian worship. The City and the Diocese have both moved for summary judgment on the grounds that plaintiffs

lack standing to maintain the action and also that the establishment of a Catholic chapel at Hopkins Airport does not violate the First Amendment of the United States Constitution.

The Court will address the issue of plaintiffs' standing.

The requirement that a plaintiff must have standing in order to bring an action in federal court has been long recognized. The most recent Supreme Court statement on the subject is contained in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752 (1982). In Valley Forge, supra, the Court noted that standing involves both constitutional ("case" or "controversey") requirements and prudential considera-

tions. The Court outlined the "irreducible minimum" constitutional requirement as follows:

> A recent line of decisions, however, has resolved that ambiguity, at least to the following extent: at an irreducible minimum, Art. III requires that the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision" Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976). In this manner does Art. III limit the federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." Flast v. Cohen, supra, at 97.

454 U.S. at 472 (footnote omitted).

The court also outlined the governing prudential consideration:

> Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties." Warth v. Seldin, 422 U.S. at 499. In addition even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches, Id. at 499-500. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 153 (1970).

454 U.S. at 474-75 (footnote omitted).

In considering the question of standing, the Court must accept all material allegations of the complaint as true and must construe the complaint in favor of the plaintiff. Jet Courier Services, Inc., v. Federal Reserve Bank of Atlanta, No. 83-3128, slip opinion July 29, 1983. Treating the complaint in this fashion, the plaintiffs are taxpayers of the City of Cleveland, who regularly use the Cleveland Hopkins Airport and the presence of a sectarian chapel there will impair their use and enjoyment of the Airport. Plaintiff Eileen Roberts has filed an affidavit swearing that the "presence of a sectarian chapel on City property at Cleveland Hopkins International Airport would create an impression, impermissible under the First Amendment, that the City of Cleveland

sponsors a religious establishment, thus affronting and embarrasing me, as well as confusing and misleading visitors from other places, including my visitors." Also, the plaintiff "will suffer irreparable injury," unless the defendants are enjoined from implementing the lease and the Court declares that the ordinance in question violates the Establishment Clause of the First and Fourteenth Amendments and 42 U.S.C. §1983.

Not one of the plaintiffs have articulated how he/she will suffer an actual or threatened injury as a result of the putatively illegal conduct. The embarrassment of which plaintiff Roberts complains is an injury in the nature of "a psychological consequence presumably produced by observation of conduct with which one disagrees. This is not an

injury sufficient to confer standing under Article III," Valley Forge v. Americans United, supra, 102 S.Ct. at 765. The plaintiffs claim that the Constitution has been violated, but fail to identify any recognizable personal injury as a consequence of the alleged constitutional error. "Article III requirements of standing are not satisfied by the abstract injury in nonobservance of the Constitution asserted by Citizens." Id. at 764 quoting Schlesinger v. Reservits Committee to Stop the War, 418 U.S. 208, 223 n. 13, 94 S.Ct. 2925, 2933 n.13 (1974).

The Supreme Court has rejected claims of standing predicated on every citizen's right to require that the Government be administered according to law and has characterized such claims as "attempts to employ a federal court as a

forum in which to air generalized grievances about the conduct of government. Valley Forge v. Americans United, 102 S.Ct. at 764.

The plaintiffs' contention, that their status as municipal taxpayers and their allegation that the municipality will suffer financially if the lease is executed will confer such a personal stake in this controversy as to confer them standing, is without merit. The plaintiffs have failed to show how they - as opposed to any other Cleveland taxpayer - will suffer any recognized personal injury. The plaintiffs' status as municipal taxpayers as opposed to federal taxpayers does not entitle them to a lesser showing of personal injury. Even though the interest of a taxpayer of a municipality in the application of money

is direct and immediate, the plaintiff must still show a direct personal injury and not merely that he suffers in some indefinite way in common with people generally. Doremus v. Board of Education, 342 U.S. 429 (1952).

The Establishment Clause does not demand exception from the requirement that the plaintiff alleged district injury to himself that is likely to be redressed if requested relief is granted. Valley Forge v. Americans United, supra.

Furthermore, the plaintiffs, as citizens, have filed nothing more than generalized grievances, insufficient to confer standing upon them as taxpayers.

The Court finds that the plaintiffs have shown no deprivation sufficient to establish standing to prosecute this action. See Brashich v. Port Authority of

New York, 484 F. Supp 697 (S.D. New York 1979).

As the plaintiffs here are found to lack standing to sue, the case is DISMISSED.

IT IS SO ORDERED.

George W. White
U.S. DISTRICT JUDGE

ARTICLE III OF
THE CONSTITUTION OF
THE UNITED STATES

CONSTITUTION OF THE UNITED STATES

ARTICLE III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impreachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * *

THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
FEB 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 85-1168

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CITY OF CLEVELAND, et al.,
Petitioners,
vs.
JANE HAWLEY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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February, 1986

Questions Presented for Review

1. Did the Court of Appeals properly find that regular users of a municipal airport have standing to challenge a city's allocation of a portion of the airport for use as a sectarian chapel, in circumstances where it appears that the city sponsors the chapel and where the users will have to confront unwanted religious exercises in a public facility?

2. Did the Court of Appeals properly reverse and remand the case to the District Court for further proceedings on the issue of municipal taxpayer standing where it found that the record on summary judgment contained evidence that the airport chapel lease was a subsidy by the city to the diocese and would result in a loss of municipal revenues?

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Ordinance and Charter Provisions Involved

In addition to the provisions cited in the petition, this case involves City of Cleveland Ordinance No. 1607-83 and Cleveland City Charter §§87 and 90. The texts are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Petitioners' description of the nature of the case and course of proceedings is accurate except that petitioners omit to mention that the District Court on April 26, 1984, granted respondents leave to file a supplemental complaint alleging violation of the right to lawful government action conferred upon the taxpayers of the City of Cleveland by its charter. The Court of Appeals did not pass on the standing issue presented by this complaint. P. App. A26.

Respondents believe that additional facts are material to the questions presented, as follows:

1. Ordinance and Lease

On June 20, 1983, the Cleveland City Council passed Ordinance No. 1607-83 authorizing the Director of Port Control to enter into a lease with Anthony M. Pilla, Bishop of Cleveland, on behalf of the

Catholic Diocese. The lease provides the Diocese with 2,733 square feet of space at Cleveland Hopkins Airport for use as a Catholic chapel for a period of twenty years at a rental of $1,200 per year (the equivalent of 44 cents per square foot per year). Previously, the city had offered the diocese a 20 year lease for 1,913 square feet at a total rental of $1.00 per year. The city had also rejected a diocese offer to rent 1,650 square feet for ten years at a rate of $3.00 per square foot per year.

The ordinance provides that the city can terminate the lease on six months' notice if the chapel space is needed for airport development, but in that event the city will be required to make "suitable comparable space" available to the diocese.

The ordinance requires city approval for all construction.

The Director of Port Control and the Bishop executed a lease agreement pursuant to the ordinance. The lease incorporates the terms specified in the ordinance. The lease also provides that "subject to previously scheduled worship services and organized events, the Bishop, upon terms and conditions satisfactory to him, shall make the premises available to other religious groups and individuals for uses consistent with the provision of chapel facilities for the air traveling public and for airport patrons, tenants and their employees."

The Director of Port Control stated that the city would monitor compliance with this provision, including determining whether any groups denied access were religious.

2. The Chapel Facility

The planned chapel will be large enough to seat 200 people. It will contain pews, an altar, a tabernacle, a pulpit, a credence table, a holy water font, and a confessional. A full-time Catholic chaplain will celebrate Mass on a regular basis. The chapel will have some stained glass windows perhaps in or around the two exterior doors to the chapel. A sign will indicate the presence of the chapel, and signs elsewhere in the airport will direct the public to the chapel.

3. The Chapel Location

The space leased for the chapel is "L" shaped. It is adjacent to a bank at the corner of the terminal mall area and Concourse B on the main level of the terminal. The chapel will have entrances at both ends of the bank, opening onto the mall and Concourse B.

The mall is located at the junction of the three airport concourses. It is the major concession area at the airport.

The mall area, in addition to the bank, includes a newsstand adjacent to the mall entrance of the chapel. Restaurants are located directly across from both the mall and Concourse B entrances to the chapel. The mall also contains a flower shop, a tobacco and gourmet shop, a bookstore, a country store, a gift shop, a candy store, a cookie shop, and a bar. Two shop areas are vacant.

Concourse B is one of three terminal concourses. It serves Eastern, Delta, Wright, Republic, and Conair Airlines. All passengers leaving or arriving by these airlines, a total of one to two million passengers annually, must pass by the chapel on Concourse B.

4. Other Rentals and Demand for Concession Space.

In 1983, the rental of the bank adjacent to the chapel, which is 1,100 square feet, generated $29,420 in income at a rate of $26.75 per square foot. The average market rental for all concessions is $20.00 per square foot. Airlines lease space in the terminal building for all purposes at rates ranging from $4.00 to $68.00 per square foot annually.

The city used the chapel space for storage and overflow office purposes. The city has never made any effort to lease the space to a commercial tenant. No applicant for commerical space has requested this specific space. The Director of Port Control and its Comptroller testified that the space is suitable for commerical use.

For the last five years, there has been a steady stream of inquiries regarding the leasing of concession space. In December, 1980, The Director of Port Control stated in a letter that there were only 4,210 square feet of concession space available. In March of 1980, he rejected an offer by a retailer to lease 500-1,000 square feet of concession space, because all space on the upper level of the mall area was committed to other concessions.

5. Relationship of Airport and City

Cleveland Hopkins International Airport is operated by the Department of Port Control, which is a department of the City of Cleveland. All funds of the Department of Port Control are public moneys of the City of Cleveland. The revenues of the Department of Port Control are deposited in the city treasury, and the department may make

no expenditure, for whatever purpose, without an appropriation by the Council of the City of Cleveland. The city secures general obligation bonds for capital improvements at the airport. As of December 31, 1982, over $10,000,000 of these general obligation bonds of the City of Cleveland were outstanding.

6. Relationship Between City and Airlines

In 1976, the city entered into an agreement and lease with the major airlines ("Master Lease Agreement") and issued revenue bonds secured by the Master Lease Agreement for additional capital improvements at the airport. The Master Lease Agreement provides generally that the landing fees paid by the airlines will be adjusted so that airport revenues will equal airport expenses.

Section 8.06 of Article VIII of the Master Lease Agreement provides for incen-

tive compensation in the form of payments by the airlines into the general fund of the city as a reward for efficient operation of the airport. Subsection (B) provides for payment into the general fund in each year that non-airline revenue per passenger (adjusted for inflation) is greater than it was the previous year.

An incentive payment, including payment pursuant to subsection (B), has been made to the general fund annually since at least 1979. In 1982, the incentive payment to the general fund was $409,630 and in 1981 it was $2,272,293. The city, by failing to obtain an average market rate rental for the chapel space and instead leasing the space to the diocese at a rate of $53,460 per year below market, stood to lose up to $59,459 in incentive compensation to its general fund in 1984.

7. Impairment of Use and Enjoyment of Airport.

Respondents in this action include taxpayers who are also users of the airport. Eileen Roberts submitted an affidavit which is representative of these claims. She states that for both professional and personal reasons she has frequent occasion to use Cleveland Hopkins International Airport, and specifically Concourse B, at the base of which the chapel will be located. Roberts asserts that the presence of a Catholic chapel, "clearly decorated as such, and having the general appearance and function of a church," will interfere with her use and enjoyment of Concourse B as a public facility.

Roberts states that as a practical matter she is compelled to use the airport and Concourse B in her travel to and from

Cleveland and that she has frequent occasion to meet visitors from other places, including foreign countries, at the airport. Roberts further states that the presence of a sectarian chapel on city property at the airport will create an impression that the city sponsors one religious sect. This impression will both affront and embarrass her.

SUMMARY OF ARGUMENT

The Sixth Circuit found that respondents who regularly use the city airport have standing to challenge the city's allocation of a portion of this public facility for sectarian purposes. On the facts presented here, this holding is consistent with the decisions of this court and with American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983).

The Sixth Circuit also entered an interlocutory ruling that respondents' taxpayer claims present questions of fact which should be resolved by the District Court. The Court of Appeals found evidence in the summary judgment record that the airport chapel lease was a subsidy by the city to the diocese and would result in a loss of municipal revenues. The remand to the District Court for consideration of these facts is consistent with the decisions of this Court and with Brashich v. Port Authority of New York, 628 F.2d 1344 (2d Cir. 1980).

The Sixth Circuit did not reach the issue of respondents' taxpayer standing based upon their interest conferred by the Cleveland City Charter in the city's lawful exercise of its corporate powers. The threatened injuries to this interest also afford respondents standing consistent with the decisions of this Court.

REASONS FOR DENYING THE WRIT.

1. The Sixth Circuit Holding That Respondents Have Standing Based On Interference With Their Beneficial Use of the Airport Is Consistent with the Decisions of this Court.

In finding that respondents have standing based on interference with their beneficial use of the airport, the Sixth Circuit applied the established standard that they must have a sufficient personal stake in the outcome of the controversy to warrant their invocation of the remedial powers of the federal courts. P. App. A10-11. The Court of Appeals reviewed Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), noting that the plaintiffs in that case lacked standing on the basis of non-economic injury because they:

> fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III....

Id. at 485.

The Court of Appeals recognized that this Court did not retreat from its earlier holding that standing could be based on non-economic injury, United States v. SCRAP, 412 U.S. 669, 686-688 (1973). The Valley Forge plaintiffs did not allege any injury of any kind. They did not reside in the state where the property was located, all of them learned of the challenged property transfer through news releases, and none of the plaintiffs expressed any interest in using the property and thus could not claim that their beneficial use of the property was impaired. P. App. A12-14.

Applying the principles discussed in Valley Forge, a unanimous panel of the Sixth Circuit found that the respondents here have standing to challenge the establishment of the airport chapel based upon their claim that it will impair their beneficial use of the airport. The court's conclusion that regular users of a government public facility have standing to challenge the allocation of such property for sectarian purposes is hardly an extravagant proposition. Cleveland's lease of a portion of its airport for a chapel effects a pro tanto reduction of the beneficial use of the airport as a public facility by those airport patrons who, because they are affronted or for some other reason, will not utilize the chapel.

The injury to these persons, diminution in the use and enjoyment of a public facility, is every bit as real as the loss suf-

fered by a student when his camping, hiking, fishing, or sightseeing is disturbed by the adverse environmental impact caused by the non use of recyclable goods. United States v. SCRAP, supra, 412 U.S. 669.

In addition, users of the airport will confront a chapel established with the apparent sponsorship of the city. The lease ordinance conferring a below market subsidy rental on the diocese is a matter of public knowledge and places the official support of the city behind the chapel.

The city has located the chapel a few feet from the center of the major concession area which is located at the junction of the airport's three concourses. All passengers departing or arriving on Eastern, Delta, Republic, Wright and Conair Airlines, a total of one to two million passengers annually, must pass by the chapel to use

Concourse B. The chapel will be identified by a sign. The chapel will have some stained glass windows perhaps in or around two exterior doors opening onto the mall and concourse B. The chapel will be staffed by a priest who will conduct regularly scheduled services. Other signs throughout the city airport will direct the public to the chapel. On these facts, the Court of Appeals found that the city will place "unwelcome religious exercises" in the path of respondents. P. App. A18-19.

In a case dealing with the leasing of advertising space for political ads on a public rapid transit system, this Court has remarked upon the interest of a transit system in protecting the general public convenience, comfort, and safety. Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974). In upholding an across the board

ban on political advertising, the Court cited concerns with imposition on a captive audience and lurking doubts about favoritism.

These concerns parallel the injury in fact which respondents will suffer here. They will confront unwanted religious exercises in a public facility, and it will appear to them that the city sponsors a Catholic chapel.

Moreover, even if respondents were to utilize other concourses, which would require booking other airlines, and avoid the mall area, the Sixth Circuit properly concluded that this impingement on their right to use the airport is sufficient to confer standing, since it would force them to assume special burdens to avoid the religious exercises. P. App. A18-19. See also Allen v. Hickel, 424 F.2d 944 (D.C.

Cir. (1970). (Plaintiffs were entitled, as members of the public, to enjoy the park land and its devotion to permissible public use; a government action cannot infringe that right or require them to give it up without access to the court to complain that action is unconstitutional). On these facts, the Sixth Circuit holding that respondents have standing based on interference with their beneficial use of the airport is consistent with the decisions of this Court.

2. The Sixth Circuit Holding that Respondents Have Standing Based on Interference with Their Beneficial Use of the Airport Does Not Conflict with the Decision of the Eleventh Circuit.

Petitioners attempt to claim that the decision below conflicts with that of the Eleventh Circuit in American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (1983).

Rabun County held that two plaintiffs who camped regularly, though not in the park where a cross was located, had shown a particularized and personalized non-economic injury to distinguish them from the general citizenry. These plaintiffs testified that they would not use the state park as long as the cross remained because of both its physical and metaphysical impact. The Sixth Circuit cited Rabun County as persuasive authority for the proposition that a plaintiff challenging sectarian use of public property for impairing his actual use and enjoyment of that property has standing to challenge the impermissible activity. P. App. A18-19.

Petitioners attempt to distinguish Rabun County. They claim that the lighted cross in Rabun County was large and visible, whereas respondents here will encounter only

a sign. Petitioners conveniently overlook that the chapel to which the sign is attached will hold two hundred people and is itself a very large structure, that it is located at the center of the airport in the major concession area, that it will be staffed full-time by a priest who will conduct regularly scheduled religious services, that it will contain stained glass windows and other permanent religious furnishings, that the one to two million passengers using Concourse B each year must pass by the chapel to get to and from their planes, and that signs at other locations in the airport will indicate the presence of the chapel. While cases will seldom present exactly the same facts, it is clear that there is no conflict between the holding here and that of the Eleventh Circuit in Rabun County.

3. The Sixth Circuit's Interlocutory Ruling on Respondents' Taxpayer Standing Claim Is Consistent with this Court's Decisions.

The Sixth Circuit's interlocutory ruling that respondents' taxpayer standing claims present questions of fact which should be resolved by the District Court is fully consistent with this Court's decisions. The Court of Appeals recognized that federal taxpayers normally lack standing to sue to enjoin federal expenditures which they regard as unconstitutional. Frothingham v. Mellon, 262 U.S. 447 (1923). An exception tion to this rule permits federal taxpayers to sue to enjoin appropriations made by Congress pursuant to the Taxing and Spending Clause of the Constitution where the appropriations violate a specific constitutional provision, such as the Establishment Clause. Flast v. Cohen, 392 U.S. 83 (1968). This

exception is a narrow one and does not apply in the case of a property transfer by the Executive branch. Valley Forge Christian College v. Americans United for Separation of Church and State, supra, 454 U.S. 464.

On the other hand, the Frothingham v. Mellon decision recognized a distinction between suits by federal taxpayers and suits by municipal taxpayers. The latter are permitted to sue to enjoin the misuse of the moneys of a municipal corporation. The interest of a taxpayer in the application of a municipality's moneys is direct and immediate. It is not unlike that of a stockholder in the finances of a private corporation. Frothingham v. Mellon, supra, 262 U.S. at 486-487. This rule is well established. There must be a good faith pocketbook action to contest a direct dollars and cents injury to the municipal

fisc. Doremus v. Board of Education, 342 U.S. 429, 434-435 (1952). [1], [2]

1/ The decision of this Court just two terms ago in Lynch v. Donnelly, ___ U.S. ___, 104 S.Ct. 1355 (1984), confirms the vitality of this doctrine. In Lynch the Court decided the merits of a suit by municipal taxpayers to enjoin city expenditures for a nativity scene. The First Circuit decision under review expressly found that plaintiffs had standing as municipal taxpayers, concluding that Valley Forge did not alter the standing of such taxpayers to challenge an allegedly unconstitutional use of their tax dollars. Donnelly v. Lynch, 691 F.2d 1029, 1031-1032 (1982). The Court will take notice on its own motion where jurisdiction does not exist. Butler v. Dexter, 425 U.S. 262, 263 n. 2 (1976). As the issue was raised and passed upon below, this Court necessarily found that the municipal taxpayers had standing when it decided Lynch.

2/ In dismissing respondents' suit, the District Court held that injuries which they sustained in common with other taxpayers were insufficient to confer standing.

> The plaintiffs' contention, that their status as municipal taxpayers and their allegation that the municipality will suffer financially if the lease is executed will confer such a personal

(Footnote continued next page)

The Sixth Circuit properly applied this principle. After a careful review of the facts presented by both sides, the Court concluded that there were questions of material fact as to whether the rental of the

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(Footnote 2 continued) stake in this controversy as to confer them standing, is without merit. The plaintiffs have failed to show how they - as opposed to any other Cleveland taxpayer - will suffer any recognized personal injury.

P. App. A35.

In Grand Rapids School District v. Ball, U.S. ___, 105 S.Ct. 3216, 3221 at n. 5 (1985), this Court made it clear that taxpayer status could continue to confer standing after the decision in Valley Forge:

> Petitioners alleged that respondents lacked taxpayer standing under Flast v. Cohen, and Valley Forge Christian College v. Americans United for Separation of Church and State. The District Court and the Court of Appeals rejected the standing challenge. We affirm this finding, relying on the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding non-public schools.

(citations omitted).

space for the chapel to the diocese was a subsidy and would harm the city's fisc. P. App. A6-8, 20-21, 26. Petitioners' one-sided presentation of the facts on this issue does not detract in any way from the analysis of the court, nor does it take into account the evidence that as early as 1980, the city was beginning to run out of concession spaces for commercial use.

In addition, the Court of Appeals did not pass on three aspects of economic harm to the city as a result of the chapel lease. Respondents will advance these additional grounds in support of standing in the District Court. [3]

3/ First, the diocese originally offered three dollars per square foot for 1,650 square feet of space for a period of ten years, and the city rejected the offer. The rejection (Footnote continued next page)

The potential loss of incentive payments cited by the Sixth Circuit and each of these

(Footnote 3 continued) of the offer of three dollars per square foot has resulted in a non-speculative loss to the city of $25,500. (1,650 x $3.00 x 10) minus ($1,200 x 20 under the current lease) equals $25,500.

Second, aside from the loss of the incentive payment, the city's rental of the chapel space to the diocese at a small fraction of the market rate gives respondents standing even if the airlines reimburse these lost rental payments. All airport revenues are deposited in the city treasury. The fact that the airlines may reimburse the city for the revenues it might otherwise obtain from the diocese does not alter the fact that there is a loss to the city treasury in the first instance. This Court has never indicated that reimbursement by a third party would defeat standing that was otherwise present. See Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (It was not a defense that copies of the Ten Commandments posted in public classrooms were financed by voluntary private contributions, for the mere posting of the copies under the auspices of the Legislature provides the official support of the state); Aguilar v. Felton, __ U.S. ___, 105 S.Ct. 3232 (1985). (Taxpayers bring successful challenge to New York City administration of Title I educational funds provided by the federal government). (Footnote 3 continued next page)

additional claims which the court did not reach upon concern a pocketbook injury to the municipal fisc. The right of respondents as municipal taxpayers to sue to prevent these harms is well established. The Sixth Circuit's reversal of the summary judgment and remand of this case to the District Court so that it can determine the taxpayer standing issue is consistent with the decisions of this Court.

(Footnote 3 continued)

Finally, the city will expend funds administering the lease. The chapel lease has already cost the city a calculable amount of time spent in negotiating the lease during a period of over three years, in drafting the lease ordinance, and in city council discussion of the matter. The city will spend money reviewing the architectural plans for the chapel, erecting signs directing people to the chapel, monitoring the diocese's compliance with the lease provision that the chapel space be made available to other groups, and providing police and other services. These costs are not speculative, and undoubtedly will far exceed the $1,365 acquisition cost and $20 per year expenditure for erecting and dismantling the nativity scene that this Court cited in its recent decision in Lynch v. Donnelly, ___ U.S. ___, 104 S.Ct. 1355, 1358 (1984), which, as noted above, was a taxpayer action.

4. The Sixth Circuit's Interlocutory Ruling on Respondents' Taxpayer Standing Claim Does Not Conflict With the Decision of the Second Circuit.

Petitioners assert that the decision below conflicts with Brashich v. Port Authority of New York, 628 F.2d 1344 (2d Cir. 1980), which summarily affirms the District Court decision reported at 484 F. Supp. 697 (S.D.N.Y. 1979), on the issue of taxpayer standing. Brashich has no application here, and the Sixth Circuit did not find petitioners' argument worthy of discussion.

In Brashich, the court held that the plaintiff lacked standing as a taxpayer to challenge the existence of three chapels located on property at Kennedy Airport at some distance removed from the terminal buildings. The plaintiff, however, had never asserted such standing or alleged injury as a

taxpayer. This is hardly surprising as the Brashich plaintiff sued only the Port Authority of New York and New Jersey, an independent entity which lacks the power to levy taxes. Simply put, there was no basis for taxpayer standing in that case, and there can be no conflict with the decision below. Respondents here bring a taxpayer action. They have sued the City of Cleveland, which levies taxes upon them and also operates the airport.

5. The Sixth Circuit Decision is Supported by an Additional Ground Which the Court Did Not Reach.

Respondents' supplemental complaint filed April 26, 1984, presents a further ground for standing which is consistent with the decisions of this Court. The City of Cleveland by §§87 and 90 of its city charter has conferred upon its taxpayers the right to seek

relief from "the misapplication of funds of the city, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the city in contravention of law...." App. A4-5.

The Sixth Circuit, having determined that respondents have standing, found it unnecessary to pass on this claim. The court commented that the argument added little to the claim of standing on the basis of harm to public finances, since if the contract is illegal, it is because it in some way represents a subsidy by the city to the diocese. P. App. A20 n.4.

While the court's comment was correct, the claim presents an additional instance of non-economic harm. The relevant charter provisions confer rights only upon taxpayers, but they afford protection against any abuse of corporate powers or illegal contract,

irrespective of harm to the municipal fisc. The charter thus confers upon respondent taxpayers a legally protected interest in the city's lawful exercise of its corporate powers, including the power to contract. It is well settled that interests created by legislative action can afford a basis for standing. Warth v. Seldin, 422 U.S. 490, 500 (1975). For standing to exist, there must be a claim of injury in fact to the interest, and it must arguably be within the zone of interests protected by the statute or constitutional provision at issue. Association of Data Processing Service Org., Inc. v. Camp, 397 U.S. 150, 153-154 (1970).

Respondents assert substantial claims that their interest in lawful action by the city is injured by city violations of the Establishment Clause absent harm to the municipal fisc. The ordinance, the terms of the

chapel lease, and the totality of the circumstances at the airport create the appearance that the city is sponsoring the chapel. Such sponsorship is illegal under the First Amendment even if the airlines reimburse all the city's financial losses. In addition, the lease provision requiring the Bishop to make the airport chapel available to other religious groups and the city's stated intent to enforce this provision create a serious entanglement of church and state which is unlawful absent any harm to the municipal fisc. See Larkin v. Grendel's Den, 459 U.S. 116 (1982) (Delegation to churches and schools of power to veto liquor licenses within a 500 foot radius enmeshes churches in the process of government and creates the danger of political fragmentation along religious lines).

Moreover, respondents' interest in the city's lawful exercise of its corporate powers is within the zone of interests protected by the Establishment Clause, which seeks to protect religious institutions from government interference and government from sectarian influences. As respondents claim injury in fact to their interest in the city's lawful exercise of its corporate powers, and this interest is within the zone of interests protected by the Establishment Clause, respondents have standing on this additional ground, which is consistent with the decisions of this Court.

CONCLUSION

For these reasons, this Court should deny the writ.

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Attorney for Respondents

APPENDIX

Ordinance No. 1607-83.

By Councilmen Ciolek, Johnson, Woods and Forbes (by departmental request).

An emergency ordinance to amend Section 1 of Ordinance No. 843-82, passed May 24, 1982, as amended by Ordinance No. 2124-82, passed December 6, 1982, authorizing the Director of Port Control to enter into an agreement with Anthony M. Pilla, Bishop of Cleveland, for use of certain space at Cleveland Hopkins International Airport.

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

Section 1. That Section 1 of Ordinance No. 843-82, passed May 24, 1982, as amended by Ordinance No. 2124-82, passed December 6, 1982, be and the same is hereby amended to read as follows:

"Section 1. That any provision of the Codified Ordinances of Cleveland, Ohio, 1976, to the contrary notwithstanding, the Director of Port Control be and said Director hereby is authorized to enter into an Agreement on behalf of the City of Cleveland granting Anthony M. Pilla, Bishop of Cleveland, on behalf of The Catholic Diocese of Cleveland, the permission, privilege and license to use approximately 2733 square feet of space in the Passenger Terminal Building at Cleveland Hopkins International Airport for the operation of a chapel at a fee of twelve hundred dollars ($1,200.00) per year. Said Agreement shall

have a term of twenty (20) years commencing upon execution, subject to termination at any time upon six (6) months' notice if all or part of such space is needed by the City for airport development. The Bishop of Cleveland shall pay all charges for installation and usage of utilities taken at the premises, and shall obtain the approval of the Director of Port Control prior to constructing or installing any improvements on the premises. In the event it becomes necessary to terminate this Agreement prior to the stated termination date, suitable comparable space will be made available to the Bishop of Cleveland."

Section 2. That existing Section 1 of Ordinance No. 843-82, passed May 24, 1982, as amended by Ordinance No. 2124-82, passed December 6, 1982, be and the same is hereby repealed.

Section 3. That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

Passed June 20, 1983

Effective June 23, 1983

City of Cleveland Charter

§8/ Application for Injunction

The Director of Law shall apply, in the name of the City, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the City, or the abuse of its corporate powers, or the execu-

tion or performance of any contract made in behalf of the City in contravention of law, or which was procured by fraud or corruption.

§90 Taxpayer's Suit

In case the Director of Law, upon written request of any taxpayer of the City fails to make any application provided for in the preceding three sections such taxpayer may institute suit or proceedings for such purpose in his own name on behalf of the City. No such suit or proceeding shall be entertained by any court until such request to the Director of Law shall first have been made, nor until the taxpayer shall have given security for the costs of the proceeding.